Supreme Court U.S.
FILED
APR 15 2002
OFFICE OF THE CLERK

No. 01-1165

In the Supreme Court of the United States

ZIMMERN BEHARRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court committed reversible error by sentencing petitioner to life imprisonment for importing cocaine and possessing with intent to distribute cocaine in the absence of allegations in the indictment and jury findings on the threshold quantities of drugs involved in petitioner's offenses.

2. Whether the district court's instructing deadlocked jurors in a manner that was a modification of the charge in *Allen* v. *United States*, 164 U.S. 492 (1896), was impermissibly coercive.

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OPINION BELOW

The opinion of the court of appeals (1 Pet. App. 23-31) is not reported, but the judgment is noted at 265 F.3d 1062 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2001 (1 Pet. App. 24). The petition for rehearing was denied on October 22, 2001 (1 Pet. App. 60). The petition for a writ of certiorari was filed on January 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of importing cocaine, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2, and two

counts of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioner was sentenced to concurrent terms of life imprisonment on each count of conviction, to be followed by five years' supervised release. The district court also imposed a fine of $250,000 and a special assessment of $200. The court of appeals affirmed. Gov't C.A. Br. 2-3; 1 Pet. App. 25.

1. Petitioner, a citizen and resident of Trinidad and Tobago (Trinidad), headed a cocaine trafficking organization based in Trinidad. Petitioner also maintained a drug distribution network based in New York for selling the drugs once they arrived in the United States. Gov't C.A. Br. 3-4.

In particular, petitioner was responsible for importing 20 kilograms of cocaine into Port Everglades, Florida, on February 2, 1994. Petitioner's organization recruited two crew members aboard the methanol tanker *Hybur Intrepid* to carry the cocaine. When the tanker arrived in Port Everglades on February 2, 1994, David Nash, one of petitioner's associates, made contact with the crew members carrying the cocaine and retrieved from them 30 kilograms of cocaine. According to Nash, 20 kilograms of the cocaine belonged to petitioner, and ten kilograms belonged to another individual. As Nash was leaving the dock in a taxi, federal agents arrested him and seized the 30 kilograms of cocaine. Gov't C.A. Br. 7-9.

Petitioner also arranged for the importation of 36 kilograms of cocaine into Port Everglades around February 10, 1994. In order to eliminate the risk of authorities discovering drugs carried by crew members, petitioner had devised a new manner of transportation. Under the new plan, the drugs would be secreted in sealed containers and placed in cargo ships

that stopped in the United States on their way to other ports. While the containers were in a bonded warehouse in the United States, someone with access to the warehouse would break into the containers, retrieve the drugs, and reseal the containers. In early February 1994, the cargo ship *Anglia* left Trinidad en route to Pakistan via Port Everglades, carrying six plastic pails containing petitioner's drugs. The *Anglia* docked in Port Everglades on February 9, 1994. Petitioner arranged for Chris Beecham to retrieve the drugs that had been secreted in the *Anglia*'s cargo. On February 10, 1994, another associate of petitioner's, Wade Lalla, picked up the drugs from Beecham's home. As he was driving away, Lalla was arrested by federal agents, who recovered 36 kilograms of cocaine from the trunk of Lalla's car. Gov't C.A. Br. 9-11.

2. On July 3, 1996, a grand jury sitting in the Southern District of Florida returned a ten-count indictment charging petitioner with various narcotics trafficking offenses. See Fifth Superseding Indictment 1-8. The indictment did not allege drug quantities; it referred to each alleged offense as involving "a detectable amount of cocaine." *E.g.*, *id.* at 1.

The United States submitted a request to the government of Trinidad for the extradition of petitioner. Trinidad surrendered petitioner on the first eight of the ten counts charged in the indictment. Before trial, the district court dismissed without prejudice two of the eight counts on venue grounds (Indictment Counts Two and Six). Petitioner was tried before a jury on the remaining six counts, which were renumbered when submitted to the jury as follows: one count of conspiring to import cocaine, in violation of 21 U.S.C. 952(a), 963 (Renumbered Count One); two counts of importing cocaine, in violation of 21 U.S.C. 952 (a) and 18 U.S.C. 2

(Renumbered Counts Two and Three); one count of conspiring to possess cocaine with the intent to distriute it, in violation of 21 U.S.C. 846 (Renumbered Count Four); and two counts of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Renumbered Counts Five and Six). Gov't C.A. Br. 2-3.

Petitioner did not request an instruction at trial requiring the jury to find the quantity of drugs involved in any of his offenses, and the court gave no such instruction in its jury charge. Gov't C.A. Br. 13.

On a Friday afternoon, after approximately three days of jury deliberations, the court received two notes from the jury, one stating that it was "stuck" and another stating that Juror 8, Carol Best, "d[id] not feel safe in the jury room" and needed the courtroom deputy. Trial Tr. 2811; Gov't C.A. Br. 26. After the court questioned Juror Best, who appeared emotionally upset, the court concluded that she was not in fact in fear of her physical safety, and Juror Best confirmed that she was upset over the "civility in the discussion." Trial Tr. 2834; Gov't C.A. Br. 26-28. During the court's inquiry of Juror Best, which defense counsel conceded was "careful" and did not "intrude upon the discussions and thought process of the jury" (Pet. C.A. Br. 29), Juror Best indicated only that other jurors had opinions contrary to hers; she never stated that she was the lone dissenter, or even that she was in the minority. Gov't C.A. Br. 30-31. The court thereafter instructed the jurors on the importance of treating each other with civility and respect and adjourned jury deliberations until Monday. *Id.* at 27.

After the jury resumed deliberations the next Monday, the court received a jury note at about 1:40 p.m. stating, "We are unanimous on Count 5, we are

hung on counts 2, 3, 4, 6, and feel we cannot make any further progress, this is unanimous." Trial Tr. 2846, 2850. Thereafter, over defense counsel's objection, the court delivered an *Allen* charge, see *Allen* v. *United States*, 164 U.S. 492 (1896), which even-handedly instructed both those favoring acquittal and those favoring conviction to reconsider the views of their fellow jurors, while at the same time cautioning the jurors that "no juror is expected to give up an honest belief he or she may have as to the weight or the effect of the evidence." Trial Tr. 2856-2858; Gov't C.A. Br. 28-29. After another one and one-half hours of deliberation, the jury returned a unanimous guilty verdict on Renumbered Counts Two and Three (importing cocaine) as well as on Five and Six (possessing cocaine with the intent to distribute it), but were deadlocked on Renumbered Counts One and Four (drug conspiracy). The court declared a mistrial on Renumbered Counts One and Four, and accepted the jury's guilty verdict on the other four counts.[1] Gov't C.A. Br. 29.

3. The Probation Department prepared a Presentence Report (PSR). The PSR assigned defendant a base offense level of 38, corresponding to a quantity of 150 kilograms or more of cocaine, U.S.S.G. § 2D1.1(c)(1). It recommended a four-level enhancement because petitioner was the organizer or leader of a criminal activity involving five or more participants, U.S.S.G. § 3B1.1(a), and a two-level enhancement for obstruction of justice based on evidence that petitioner offered bribes to witnesses, U.S.S.G. § 3C1.1. This resulted in an adjusted offense level of 44, which was reduced to 43

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[1] Renumbered Counts One and Four were subsequently dismissed on the government's motion.

(the highest level on the sentencing table, U.S.S.G. Ch. 5, Pt. A n.2).

In written objections to the PSR, petitioner challenged, *inter alia*, the drug amounts attributed to him on the basis of relevant conduct, but affirmatively stated that he "should be held responsible for 46 kilograms of cocaine, which is the combined amount of the two importations of which [petitioner] was convicted and for which he could be held responsible."[2] Petitioner's Objections to PSR at 2; see also *id.* at 3, 8, 11. He further stated that "[t]he government must establish drug quantities by a preponderance of the evidence." *Id.* at 9; *id.* at 12 (arguing that "preponderance" standard applies to role in the offense enhancement).

At the sentencing hearing on March 10, 2000, petitioner again conceded, repeatedly, that 46 kilograms of cocaine were properly attributable to him. Trial Tr. 2968, 2971, 2972. The district court found an additional 217 kilograms attributable to petitioner as relevant conduct, over petitioner's objections, for a total of 263 kilograms (which did not affect the base offense level of 38 calculated by the PSR). *Id.* at 2951-2958.

Following petitioner's argument that the clear and convincing standard of proof applied because of the significant effect of the drug quantities on his sentence, the district court noted that the evidence easily met the clear and convincing standard, but held that the pre-

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[2] The PSR stated that ten of the 30 kilograms from the February 2nd shipment belonged to petitioner, although the trial testimony was that 20 kilograms belonged to petitioner. PSR ¶ 48. Since the government made no objection to that portion of the PSR in the district court, the government assumed on appeal that petitioner was responsible for ten kilograms of the February 2nd shipment. Adding ten kilograms to the 36 kilograms from the February 10th shipment totals 46 kilograms.

ponderance standard in fact applied. Trial Tr. at 2957-2958. Indeed, the court stated that the evidence demonstrated that the court's drug quantity findings were "the most conservative view of what was going on in this case." *Ibid.*

To the resulting offense level of 38, the district court declined to apply the PSR's recommended two-level enhancement for obstruction of justice, but did apply a two-level enhancement for use of a firearm, U.S.S.G. § 2D1.1(b)(1), and a four-level enhancement for leadership role in the offense, resulting in an adjusted offense level of 44 (again necessarily reduced to level 43). The court assigned petitioner a criminal history category of I, which, together with the offense level, yielded a Guidelines' sentence of life imprisonment. The court denied petitioner's downward departure motion and sentenced petitioner to concurrent terms of life imprisonment and five years' supervised release on each count of conviction and imposed a fine of $250,000 and a special assessment of $200. Gov't C.A. Br. 16.

4. The court of appeals affirmed in a per curiam opinion. 1 Pet. App. 23-31. Although petitioner raised numerous issues on appeal, the court concluded that only three warranted brief discussion. *Id.* at 25. First, the court found that misrepresentations made by government agents in order to protect the identity of a confidential informant during certain grand jury proceedings and petitioner's extradition proceedings were "not material."[3] *Id.* at 27. The court explained

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[3] The court of appeals noted that petitioner had not clearly demonstrated that the government misrepresentations at issue were made before the actual grand jury that indicted him, a question the court did not reach because petitioner was not, in any case, entitled to relief. 1 Pet. App. 25 n.1.

that "the informant's existence, identity, and participation appear to have played no significant roles in the decisions to indict, extradite, and convict [petitioner]." *Ibid.*

Second, the court rejected petitioner's argument that the district court's instruction to the then-deadlocked jurors to reconsider their views in light of the opinions of their fellow jurors, a modification of the charge given in *Allen* v. *United States*, *supra*, was impermissibly coercive. 1 Pet. App. 28. The court based its ruling on its consideration of the "totality of the circumstances" and further noted that "the fact that [petitioner's] jury failed to reach a verdict with respect to two of six counts after the *Allen* charge was given also demonstrates that the jury was not unduly coerced into reaching a verdict by the charge." *Ibid.*

Finally, with respect to petitioner's sentences on the drug counts, the court of appeals recognized that the district court erred under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), by sentencing petitioner to life sentences based on quantities of drugs that were not alleged in the indictment or submitted to the jury. 1 Pet. App. 29-30. The court of appeals held that the district court's error did not require reversal, however, "because the undisputed evidence offered at trial with respect to drug quantities was overwhelming and more than sufficient to support [petitioner's] concurrent life sentences." *Id.* at 30-31. The court did not reach the issue whether the error was subject to "preserved error review or plain error review" because, according to the court, "the result in this case is the same under either standard of review." *Id.* at 30 n.5.

DISCUSSION

1. a. Petitioner contends (Pet. 3-30) that the life sentences imposed on each drug count are unconstitutional because they were increased beyond the ordinary statutory maximum based on the amount of cocaine involved in the offense, a fact that was not alleged in the indictment or submitted to the jury for determination beyond a reasonable doubt. See 1 Pet. App. 29-30 & n.4. This issue is essentially the same as that presented in *United States* v. *Cotton*, No. 01-687 (to be argued Apr. 15, 2002). Accordingly, the petition in this case should be held pending the Court's decision in *Cotton* and then disposed of as appropriate in light of that decision.[4]

b. Petitioner also contends (Pet. 21-23) that his sentences were unlawful under *Apprendi* because the district court, rather than the jury, made the drug quantity determination that was used to calculate his sentencing range under the Sentencing Guidelines. That claim merits no further review.

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[4] Petitioner's argument (Pet. 23-27) that the court of appeals erred in considering statements made by defense counsel at sentencing about the quantity of cocaine established by the evidence at trial plainly lacks merit. The court explicitly discussed the testimony of "cooperating government witness David Nash" that "he retrieved 30 kilograms of cocaine on February 2 on [petitioner's] instructions," and that "cooperating witness Wade Lalla testified that he took possession of 36 kilograms of cocaine on February 10 pursuant to [petitioner's] instructions," before even mentioning defense counsel's concession at sentencing. 1 Pet. App. 31. And the court rested its conclusion that the "undisputed evidence offered at trial with respect to drug quantities was overwhelming," *id.* at 30, not on counsel's statements, but on the testimony it had described, *id.* at 31 ("In light of this evidence with respect to the two dates at issue * * *.").

This Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that, so long as the statutory minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (Guidelines "instruct the judge * * * to determine" the type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon amount and kind"). *Apprendi* did not hold otherwise. See *Apprendi*, 530 U.S. at 497 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards*, 523 U.S. at 515).

The Sentencing Guidelines simply "channel the sentencing discretion of the district courts and * * * make mandatory the consideration of factors" that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). A district court retains the authority to "depart from the applicable Guideline range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). Because the Guidelines leave the sentencing court with significant discretion to impose a

sentence within the statutory range, and because specific offense characteristics and sentencing adjustments under the Guidelines cannot increase the statutory maximum penalty for a criminal offense, *Apprendi* does not support a challenge to the constitutionality of the Guidelines. See Sentencing Guidelines § 5G1.1; *Edwards*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines").

The courts of appeals have consistently rejected efforts to apply *Apprendi* to findings under the Sentencing Guidelines. See, *e.g.*, *United States* v. *DeSumma*, 272 F.3d 176, 181 (3d Cir. 2001); *In re Sealed Case*, 246 F.3d 696, 698-699 (D.C. Cir. 2001); *United States* v. *Garcia*, 240 F.3d 180, 184 (2d Cir.), cert. denied, 121 S. Ct. 2615 (2001); *United States* v. *Heckard*, 238 F.3d 1222, 1235-1236 (10th Cir. 2001); *United States* v. *Baltas*, 236 F.3d 27, 40-41 (1st Cir.), cert. denied, 532 U.S. 1030 (2001); *United States* v. *Kinter*, 235 F.3d 192, 198-202 (4th Cir. 2000), cert. denied, 532 U.S. 937 (2001); *United States* v. *Munoz*, 233 F.3d 410, 413-414 (6th Cir. 2000); *United States* v. *Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000), cert. denied, 122 S. Ct. 552 (2001); *United States* v. *Chavez*, 230 F.3d 1089, 1090 (8th Cir. 2000); *United States* v. *Doggett*, 230 F.3d 160, 166 (5th Cir. 2000), cert. denied, 531 U.S. 1177 (2001); *United States* v. *Hernandez-Guardado*, 228 F.3d 1017, 1024-1027 (9th Cir. 2000); *Hernandez* v. *United States*, 226 F.3d 839, 841-842 (7th Cir. 2000). Review by this Court is therefore not warranted.[5]

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[5] In *Harris* v. *United States*, No. 00-10666, this Court granted review to decide whether brandishing a firearm, which results in an increased mandatory minimum sentence under 18 U.S.C. 924(c)(1)(A) (1994 & Supp. V 1999), must be charged in an indict-

2. Finally, petitioner contends (Pet. 28-30) that the district court's instruction to the jurors that they should reconsider their opinions in the light of the views of their fellow jurors, a modification of the charge in *Allen* v. *United States*, 164 U.S. 492 (1896), was impermissibly coercive. Because that contention, which has already been rejected by the court of appeals after full consideration, manifestly does not warrant this Court's review, the government waives its right to respond to that claim unless requested to do so by the Court.

CONCLUSION

With respect to petitioner's claim that his life sentences constitute reversible error under *Apprendi* because they were each increased beyond the ordinary statutory maximums in the absence of allegations in the indictment or jury findings as to the specific quantities of drugs involved in the offenses, the petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Cotton*, No. 01-687, and then disposed of accordingly. In all other respects, the petition should be denied.

Respectfully submitted.

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APRIL 2002

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ment and proved beyond a reasonable doubt. The features of the Guidelines discussed in the text differentiate the constitutional question in *Harris* from any constitutional challenge to the Guidelines. This case therefore need not be held for *Harris*.